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In The

Supreme Court of the United States

October Term, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY AND THE COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AS *AMICI CURIAE*

Michael S. Wald
Stanford Law School
Stanford, California 94305

David Gilman
National Council on Crime and Delinquency
411 Hackensack Avenue
Hackensack, New Jersey 07601

Attorneys for Amici Curiae

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Interest of the *Amici Curiae*

The National Council on Crime and Delinquency is a non-profit membership corporation, incorporated in 1921 as a national service agency. Since that time the NCCD has endeavored to develop standards and guides for the improvement of juvenile court work and other phases of the correctional field. It presently has a membership of over 60,000 citizens and officials. The representative nature of the Council is further indicated by the make-up of its officers and Board of Trustees, which is annexed as Appendix A for the information of the Court.

In conjunction with its advisory arm, the Council of Judges, NCCD has drafted model legislation covering many aspects of the justice system. It is the publisher of the Standard Juvenile Court Act, now in its sixth edition. In addition to developing model standards, NCCD provides consultation and research for courts and other agencies. Through its activities NCCD has become familiar with the functioning of the juvenile justice system throughout the country.

The Council of Judges represents jurists throughout the United States. Members sit on the bench of federal, state and municipal courts. The Council serves in an advisory capacity to the National Council on Crime and Delinquency. Due to its nationwide membership, the Council of Judges is aware of the potential implications of court decisions on the operation of the juvenile and criminal justice systems in many states.

NCCD and the Council of Judges are vitally concerned with improving the administration of justice. They are particularly concerned with retaining the rehabilitative goals of the juvenile court. The case before this Court raises issues central to the overall functioning of our juvenile justice system. The impact will vary significantly from state to state. Since NCCD and the Council of Judges are able to provide a broader perspective than are the other litigants on the likely total impact of the decision, we present this brief.

The parties have consented to the filing of an *amici curiae* brief by the Council of Judges and NCCD. Copies of their letters of consent have been forwarded to the Clerk.

ARGUMENT

I. Introduction

This brief focuses solely on the implications of this case for the proper functioning of the juvenile justice system. The *amici curiae* believe that as a matter of constitutional law the double

jeopardy clause clearly applies in the instant situation, since the proceeding arises after prosecution in an adult court. We support the legal arguments in respondent's brief and argue for affirmation of the lower court decision.

This Court has indicated that it will take into account the likely impact extension of a specific right to minors would have on the functioning of the juvenile court system in deciding whether to apply specific constitutional safeguards to juvenile court proceedings. *McKeiver v. Pennsylvania,* 403 U.S. 528, 547, 550 (1971). This brief discusses the reasons why affirmance of the lower court decision is necessary in order to protect the independence, integrity, and rehabilitative goals of juvenile courts.

II. Holding Transfer Hearings Prior to Adjudicatory Hearings Best Serves the Rehabilitative Goals of the Juvenile Justice System.

The National Council on Crime and Delinquency and its advisory committee, the Council of Judges, have long supported the proposition that once an adjudicatory hearing begins in juvenile court the minor is in fact in jeopardy, and to transfer him to criminal court for another trial on the facts alleged in the juvenile court petition would constitute a deprivation of due process of law.[1] See *Model Rules for Juvenile Courts,* Rule 9, and Comment (Council of Judges of the National Council on Crime and Delinquency, 1969); Standard Juvenile Court Act §13 (6th Ed. 1959) prepared by the Committee on the Standard Juvenile Court Act of the National Council on Crime and Delinquency, in cooperation with the National Council of Juvenile Court Judges and the U.S. Children's Bureau.

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1. We agree with petitioner that a hearing to determine whether there is probable cause to believe that the minor committed the offense in question would not place the minor in jeopardy. Petitioner's Opening Brief, p. 37.

Petitioner is incorrect in stating that the Standard Juvenile Act is silent on the issue of double jeopardy. Section 13 of the Standard Juvenile Court Act is as follows:

TRANSFER TO OTHER COURTS

> If the petition in the case of a child sixteen years of age or older is based on an act which would be a felony if committed by an adult, and if the court after full investigation and a hearing deems it contrary to the best interest of the child or the public to retain jurisdiction, it may in its discretion certify him to the criminal court having jurisdiction of such felonies committed by adults. No child under sixteen years of age at the time of commission of the act shall be so certified.
>
> When a petition has been filed bringing a child before the court under the provisions of subdivision 1 or 2 of Section 8 of this Act and the child resides outside the court district but in the state, the court may, in its discretion, transfer the case to the court having jurisdiction in the district where the child resides; or in such case the court may, after a finding on the allegations in the petition, certify the case for disposition to the court where the child resides. Thereupon, the court receiving such transfer shall dispose of the case as if the petition were originally filed or the finding were originally made there. Whenever a case is so certified, the certifying court shall forward to the receiving court certified copies of all pertinent legal and social records.
>
> When a petition has been filed a child shall not thereafter be subject to a criminal prosecution based on the facts giving rise to the petition, except as provided in this section.

This Section was intended to bar later prosecutions after an adjudicatory hearing had begun, and this is clearly

the import of the language.[2]

Contrary to the speculation by the petitioner, the recommended standards do not just reflect cautious draftsmanship to avoid potential double jeopardy problems. Cf. Petitioner's Opening Brief, pp. 49-50. Rather, they reflect the judgment of the Council of Judges and the NCCD that the rehabilitative purposes of the juvenile court system are best served by holding transfer proceedings prior to, rather than after, adjudicatory hearings.

Holding transfer hearings after adjudicatory hearings diminishes the possibility of rehabilitation both by discouraging the minor's cooperation with the juvenile court and by delaying the establishment of a treatment plan. It is a central goal of the Juvenile Court system to attempt to deal with a minor informally, without the negative aspects of the criminal justice system. Minors are encouraged to cooperate fully by the promise that the system is concerned solely with their best interest. In fact, counsel for a minor, recognizing the potential benefits to the minor of cooperation, may well take a leading role in encouraging cooperation, explaining the various rehabilitative programs to the minor and assuring that an appropriate disposition in fact occurs. See Kay and Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 Geo. L. Rev. 1401, 1409-20 (1974).

However, if the minor and his counsel believe that the minor may be subjected to a transfer proceeding after an adjudicatory hearing any cooperation will cease. The minor will rightly view the process as potentially hostile and respond accordingly. Counsel would be derelict to suggest cooperation,

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2. This position is similar to that adopted by other organizations concerned with juvenile courts. For example, the Children's Bureau of the United States Department of Health, Education and Welfare takes the position that the double jeopardy clause applies to juvenile court proceedings. W. Sheridan, *Legislative Guide for Drafting Family and Juvenile Court Acts*, U.S. Department of Health, Education and Welfare, Publication #472-69. §27 and Comment (1969).

since he cannot guarantee that his client will receive the benefit of juvenile court treatment.[3] Thus, adversary proceedings become necessary in many more cases than if the transfer hearing is held first. The goal of having speedy and informal hearings is jeopardized. See *In re Winship*, 397 U.S. 358, 375 (1970) (concurring opinion of Mr. Justice Harlan); *McKeiver v. Pennsylvania, supra*, 403 U.S. at 550. Significantly, this delay may occur even in cases where transfer procedures are not ultimately instituted, since counsel cannot be certain that transfer will not be requested.

Moreover, during the time that the minor is awaiting trial he may develop a negative attitude toward the juvenile court, thereby diminishing the prospects of effective rehabilitation. On the other hand, if the transfer hearing is held first, the minor can then be told that the court's primary interest is in seeing whether a rehabilitation plan can be developed. Counsel can confidently advise the minor to cooperate with the process, recognizing that his cooperation can only benefit, not harm, him. If the minor is found fit, he will often admit the charges and the chances for rehabilitation will be considerably enhanced.

Holding the transfer hearing after the adjudicatory hearing also delays substantially the establishment of a rehabilitation program for the minor in those cases where the minor is found fit for juvenile treatment. When the adjudicatory hearing is held first, counsel must initially prepare for the trial on the merits. This may require four or more weeks, especially if the charges

3. In fact, counsel would generally advise total silence, since any statements or admissions made by the minor might be used against him in an adult trial. The California Supreme Court tried to minimize this problem by ruling that statements made in juvenile court are inadmissible, *Bryan v. Superior Court of the County of Los Angeles*, 7 Cal.3d 575, 586-7, 102 Cal.Rptr. 831, 498 P.2d 1079 (1972), but this is not adequate protection, since the statements can lead to other evidence which won't be clearly inadmissible, or which may give the prosecutor tactical advantages in the adult proceedings.

are serious. If the minor is found guilty, counsel then needs additional time to prepare for the transfer hearing. Given the importance of this hearing, see *Kent v. United States*, 383 U.S. 541 (1966), several more weeks are usually needed.

All during this time the minor probably will be incarcerated. Unfortunately most juvenile detention homes are basically holding facilities without any treatment program. See Rosenheim, *Detention Facilities and Temporary Shelters* in Child Caring (ed. Pappenfort, Kilpatrick, Roberts, 1973), pp. 259-265; *Children in Custody, A Report on the Juvenile Detention and Correctional Facility Census of 1971*, U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, esp. pp. 13-16; Reuterman, Hughes & Love, *Juvenile Detention Facilities: Summary Report of a National Survey*, 9 Criminology 3 (1971). Many minors are kept in jails during this period of time. It has been increasingly recognized that early identification and treatment of the problems leading juveniles to commit crimes is essential to successful rehabilitation. See Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 Crime and Delinquency 180, 182 (1971). In addition, the uncertainty over the ultimate disposition creates anxiety in the minor and contributes to his negative attitude towards the juvenile process. See Snyder, *supra* at 184.

For these reasons *amici curiae* believe that applying the double jeopardy clause to bar any subsequent proceedings after a juvenile court adjudication hearing is totally consistent with the purposes underlying the juvenile court approach, i.e., protection and rehabilitation of the minor, and in fact, its application will facilitate the attainment of these goals.

III. Application of the Double Jeopardy Clause to Juvenile Proceedings is Necessary to Protect the Integrity of the Juvenile Court.

In addition to facilitating the rehabilitative goals of the juvenile justice system, application of the double jeopardy clause

to juvenile court hearings is necessary in order to protect the integrity of the juvenile court process itself. Unless double jeopardy applies, the juvenile court process is subject to the possibility of significant misuse by prosecuting authorities.[4]

The problem is most acute in states which, unlike California, permit a prosecutor to file proceedings against a minor in adult court even though the juvenile court has elected to retain jurisdiction. See, e.g., Florida Stat. Ann. §39.02(6). The problem is illustrated by a recent case from Florida, *R.E.F. v. State.* In that case the juvenile court held an adjudicatory hearing and decided

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4. It is possible that the double jeopardy clause could be applied differently depending on the context in which the case arises. Prior jeopardy may be in issue in six different situations:

(a) The minor has been acquitted after an adjudicatory hearing in juvenile court and is being retried in juvenile court for the same offense.

(b) The minor has been acquitted after an adjudicatory hearing in juvenile court and is being retried in adult court for the same offense.

(c) The minor has been convicted in juvenile court, found fit, and is awaiting disposition when adult charges are brought by a prosecutor.

(d) The minor has been convicted in juvenile court, found fit, and a dispositional program has commenced when adult charges are brought by a prosecutor.

(e) The minor has been convicted in juvenile court, found fit, placed in a juvenile correction facility, and is then returned to juvenile court by the institution as unamenable to the treatment of the institution, and the minor is then transferred to adult court for prosecution.

(f) The minor has been convicted in juvenile court, and the juvenile court at a transfer hearing held prior to any disposition finds the minor unfit.

This last situation is the only one before this Court. However, *amici curiae* believe that the policy considerations which dictate application of the double jeopardy clause in situations (a) through (e) should also be considered in deciding the present case. Application of the double jeopardy clause will aid the goals of the juvenile court in all six situations. Developing separate doctrines for each situation would be cumbersome, confusing and unnecessary.

to retain jurisdiction over the minor. The minor was sent to a juvenile treatment institution. However, the prosecuting attorney then brought criminal proceedings in adult court, and the Florida Supreme Court ruled that these proceedings were not barred by the double jeopardy clause. *State v. R.E.F.,* 251 So.2d 672 (Fla.App. 1971), *aff'd sub nom. R.E.F. v. State,* 265 So.2d 701 (1972), habeas granted, *Fain v. Duff,* 364 F.Supp. 1192 (M.D. Fla. 1973), *aff'd* 488 F.2d 218 (5th Cir. 1973) (en banc), petition for cert. filed 42 U.S.L.W. 3667 (U.S. June 4, 1974) (No. 73-1768).

As *Fain* illustrates, unless the double jeopardy clause is applied to prevent a criminal trial after an adjudication in juvenile court, the juvenile court cannot function as an independent body serving the rehabilitative needs of the minor. The prosecutor is able to undermine the juvenile court judge's authority to determine the appropriate dispositional action. The expertise of the juvenile court judge in deciding whether a minor needs and can benefit from treatment can be ignored by a prosecutor who may be responding primarily to public pressure.[5] Cf. *United States v. Candelaria,* 131 F.Supp. 797 (1955).

The ability of a prosecutor to file charges in adult court substantially hinders the effective implementation of a treatment plan. If adult charges are pending, or if there is a possibility that adult charges will be filed, a juvenile court judge may delay sending a minor to a treatment program until the adult charges are settled. As previously discussed, such delay can greatly decrease the potential success of the treatment program.

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5. It should also be recognized that, at least theoretically, the prosecutor could file charges in adult court even after an acquittal in juvenile court. *Amici curiae* believe that an acquittal following a full juvenile court hearing fully protects the public, and any further proceedings would undermine the status of the juvenile court. Moreover, it would be manifestly unfair to give the state a second chance in an adult proceeding to convict a youngster found not guilty in juvenile court. See *Richard M. v. Superior Court,* 4 Cal.3d 370, 93 Cal.Rptr. 752, 482 P.2d 464 (1971).

The possibility of adult charges being filed may be deleterious even when the minor is sent to a treatment institution. Faced with the uncertainty over his status, the minor may be unable or unwilling to participate wholeheartedly in the treatment program. We certainly cannot expect a minor in such a situation to have the positive attitude needed for successful treatment. In addition, the minor's confidence in the fairness and integrity of the entire justice system will be impaired if he has cooperated with the juvenile court and then winds up facing a criminal trial.

Even in states like California, where the prosecutor cannot independently bring an adult court action, it is possible for the district attorney to misuse the juvenile court processes. A district attorney can press for a full jurisdictional hearing in juvenile court in order to discover the minor's defense and then press the juvenile court to find the minor unfit. Although this may not have occurred in the case before this Court, the Council of Judges is concerned over such potential abuses. Since application of the double jeopardy clause would prevent such problems, it is in the interest of the juvenile justice system that the protection be extended.

IV. Fundamental Fairness to Minors Requires Application of the Double Jeopardy Clause.

The judges who authored the Model Rules and the judges and others who authored the Standard Juvenile Court Act believe that it is essential to have minors feel that they are treated fairly if the rehabilitative goals of the system are to be achieved. Therefore, they strongly support extension of due process protections to juvenile court proceedings in a manner consistent with the goals of the juvenile court system.

Juvenile court proceedings involve the potential loss of liberty for the minor. *In re Gault*, 387 U.S. 1 (1967). Preventing double punishment for the same offense is one of the basic concerns underlying the double jeopardy clause. See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 266 N.13 (1961); *Ex Parte Lange*, 85 U.S. (18 Wall) 163, 173 (1873). To allow juveniles to be retried after a juvenile proceeding would clearly subject them to the possibility of double punishment.[6]

In addition, the double jeopardy clause protects persons from going through the hardship and trauma of two trials, regardless of whether they were acquitted or convicted in the first trial. While every effort may be made to keep juvenile proceedings as informal and non-punitive as possible, it is still true that going through a juvenile court proceeding is a traumatic experience for a minor. It is the position of the Council of Judges that once a juvenile has undergone this experience, it is contrary to his interest to be forced to face another trial.

Finally, it is unfair to place a minor in a position where by defending himself in juvenile court he may be making it easier for a prosecutor to obtain a conviction in adult court. This will necessarily occur if the adjudicatory hearing is held first. Especially in light of the positive reasons for holding transfer hearings first, it is essential that any appearance of unfairness be eliminated by applying the double jeopardy clause to juvenile court proceedings.

V. Application of the Double Jeopardy Clause to Juvenile Proceedings Will Not Create Additional Burdens on the Juvenile Justice System.

From the perspective of sound judicial administration, it is quite feasible to hold transfer hearings prior to adjudicatory

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6. As previously indicated, juveniles may be subjected to double punishment when a prosecutor files adult charges after the minor has been sentenced, or given a disposition, in juvenile court. In addition, California and several other states allow transfer to adult court for prosecution if a juvenile institution will not keep the minor. *California Welfare and Institutions Code* §§707, 780 (West 1972).

hearings. Such a procedure is required in 15 states, see Petitioner's Opening Brief, pp. 47-8, and was recommended as the preferable procedure by the California Supreme Court. See *Donald L. v. The Superior Court of Los Angeles County*, 7 Cal. 3d 592, 102 Cal.Rptr. 850, 498 P.2d 1098 (1972).

Petitioner has suggested that if transfer hearings must be held prior to the adjudicatory hearing, this will create a substantial burden on the juvenile court. Petitioner's Opening Brief, pp. 38-41. However, petitioner's arguments appear to be based on incorrect assumptions about the manner in which juvenile courts operate. Because these assumptions are critical to petitioner's argument, it is necessary to describe in some detail how the process actually works in California and in most jurisdictions.

Petitioner assumes that "[i]f transfer is barred as a dispositional alternative to probation or placement in a juvenile facility, states such as California must adopt a preliminary hearing procedure in all juvenile court cases. . . ." Petitioner's Opening Brief, p. 38. This is simply incorrect. First of all, fitness hearings will not have to be held in every case brought to juvenile court. Virtually every state statute substantially limits the type of cases in which transfer is authorized – by restricting the type of offenses for which transfer is possible and/or by allowing transfer only if the minor is over a certain age. See Rudstein, *Double Jeopardy in Juvenile Proceedings*, 15 Wm. and Mary L. Rev. 266, 297-8 (1972). For example, in California only minors who were 16 or 17 years old at the time of the offense may be transferred. *California Welfare and Institutions Code* §707. Thus, one cannot use the total number of cases heard by the juvenile court as a basis for estimating the potential number of transfer hearings. Cf. Petitioner's Opening Brief, p. 41.

Moreover, transfer is not a realistic alternative in the overwhelming majority of cases in which the minor is eligible for transfer, and no special hearing is necessary to establish that fact. Under most statutes transfer is appropriate only when the minor

has committed a serious offense or has an extensive history of delinquent behavior which indicates he may be unamenable to treatment in the juvenile system. See Rudstein, *supra*, 14 Wm. and Mary L. Rev. at 299. The available evidence indicates that only a small number of cases fall in this category.[7]

Furthermore, the cases where transfer is likely are invariably identified very early in the juvenile court process. See *State v. Halverson*, 192 N.W.2d 765, 769 (Iowa 1971). In California, as in most states, the juvenile probation department begins consideration of dispositional alternatives as soon as charges are filed in juvenile court. See H. Thompson, *California Juvenile Court Deskbook*, California Council of Trial Judges (1972), §10.2, p. 146. In most cases it is clear that the minor is amenable to juvenile court treatment, and the possibility of a fitness hearing is not considered. No transfer hearing is needed in these cases. If it appears to the probation officer that fitness may be in issue, it is the general practice throughout California to indicate this to the juvenile court judge *prior to the adjudicatory hearing.*[8]

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7. See Hays and Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 Houston L. Rev. 709, 710 (1972) (reporting that the Houston, Texas juvenile court considered the waiver of 18 juveniles over a six-month period. Distributed among those 18 were 21 charges: 10 of murder and assault to murder, 3 of rape, and 8 of robbery by firearms); Note, *Problem of Age and Jurisdiction in the Juvenile Court*, 19 Vand. L.Rev. 833, 854 (1966) (reporting on a Nashville study where every juvenile remanded to criminal court over a 17-month period had appeared in juvenile court at least once before; 43 of 49 had previously been committed).

8. Although there is no published study of the procedures generally followed in juvenile courts in California, Professor Michael Wald, counsel for *amici curiae*, has recently completed an extensive analysis of the procedures in two large California counties, Alameda and Santa Clara. All of the cases transferred from juvenile court to adult court during 1971 and 1972 in these two counties were examined. Computer printout, available at Stanford Law School, shows that the transfer hearings were held prior to the adjudicatory hearing in 220 of the 239 cases in which a transfer occurred. See also Thompson, *supra*, *California Juvenile Court Deskbook* §10.3, pp. 146-8.

Only in these cases need a transfer hearing be held,[9] and transfer hearings would be necessary in these cases *even if the adjudicatory hearing were held first.*[10] Thus, there is no reason to expect an increased number of hearings if transfer hearings are held first.

In fact, it is quite possible that fewer hearings will be necessary. As previously discussed, if the transfer hearing is held first and the minor is found fit, he may then admit jurisdiction, thus obviating the need for an adjudicatory hearing. In addition, the dispositional issues will have been discussed at the transfer hearing, so only a brief dispositional hearing would be necessary. If the minor is found to be unfit, the need for an adjudicatory hearing would be eliminated.

It is true that in jurisdictions which have only one juvenile court judge and where the same judge cannot conduct both a transfer hearing and an adjudicatory hearing there may be administrative difficulties in having the transfer hearing first. However, the use of visiting judges or the temporary elevation of a municipal court judge to serve as a superior court judge – if, as in California, only superior court judges can hear juvenile court cases – should be adequate to meet the problem. *Amici curiae* believe that any burdens in this regard are more than compensated for by the likelihood of fewer contested jurisdictional hearings and the increased prospects for rehabilitation achieved by holding transfer hearings first.

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9. Since minors who are transferred generally have extensive delinquent histories, they will already have had social studies about them conducted. Thus, they will have already suffered any stigmatization which such a study would entail. A minor who does not want the study conducted can waive his right to having the transfer hearing conducted prior to the adjudicatory hearing.

10. This, of course, would not be true in those few cases where the minor is found not guilty.

CONCLUSION

In *McKeiver v. Pennsylvania, supra,* this Court refused to extend the right to jury trials to juvenile court hearings. The presence of juries, said the Court, would increase the criminal aspects of the juvenile hearing and thereby undermine the distinctive nature of the juvenile process. Further, jury trials were not thought to be essential to assure a fair fact finding process. Unlike the situation in *McKeiver,* there is no compelling reason to deny juveniles the protection against being placed twice in jeopardy. On the contrary, application of the double jeopardy clause prevents the juvenile hearing from becoming more criminal in nature. Its application will facilitate the rehabilitative goals and the proper functioning of the juvenile court system. Therefore, we urge this court to affirm the judgment below.

Respectfully submitted,

Michael S. Wald
Stanford Law School
Stanford, California 94305

David Gilman
National Council on Crime and Delinquency
411 Hackensack Avenue
Hackensack, New Jersey 07601

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, David Gilman, Counsel for Amicus, hereby certify that on or before January 12, 1975, three (3) copies of this brief were duly served upon attorneys for both parties by mail service postage prepaid.

David Gilman
National Council on Crime & Delinquency
411 Hackensack Avenue
Hackensack, New Jersey 07601

APPENDIX A

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1040 North Lakeshore
Chicago, Illinois 60611

Mrs. Curtis Bok
330 Spruce Street
Philadelphia, Pa. 19106

Mr. John Boone
Boston University School of Law
141 Bay State Road
Boston, Mass. 02215

Mr. Jon Galt Bowman
Commercial Marine Properties
3201 Fairview Avenue East
Seattle, Washington 98102

*Mr. Franklin F. Bruder
41 Park Avenue
New York, New York 10016

Mr. Stephen A. Bruns
Associate
Social Action Department
Diocese of Kansas City–
St. Joseph
527 West 39th Street
Kansas City, Missouri 64111

Hon. Winslow Christian
California Court of Appeal
4154 State Building
San Francisco, Calif. 94102

*Mr. Robert B. Clark
President
Hoffman-LaRoche, Inc.
340 Kingsland Street
Nutley, New Jersey 07110

Mr. Bill Cosby
Sah Enterprises, Inc.
1900 Avenue of the Stars
Suite 1929
Century City, Calif. 90067

*Hon. Francis L. Dale
United States Ambassador to
the United Nations at Geneva
Department of State
Washington, D.C. 20521

Mr. Leon DeKalb
39 Primrose Lane
Roosevelt, New York 11575

*Mrs. Henry E. I. duPont
Box 4000
Greenville, Delaware 19807

Mr. Harry E. Estell
Principal
Wendell Phillips School
2621 South Michigan Avenue
Chicago, Illinois 60616

Mr. Jewett T. Flagg
35501 Blackwater Farms
Route 4, Box 101
Jasper, Alabama 35501

Mr. Curtiss E. Frank
President
Council for Financial Aid to
Education
680 Fifth Avenue
New York, New York 10019

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Vice President
Ogden Corporation
161 East 42nd Street
New York, New York 10017

Mr. Douglas A. Fraser
Vice President
United Auto Workers of America
8000 East Jefferson Avenue
Detroit, Michigan 48214

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* Executive Committee Member

Professor Charles Fried
Law School of Harvard University
Cambridge, Mass. 02138

Ms. Joan R. Garber
3138 Bishop Street
Cincinnati, Ohio 45220

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Pres. & Chief Executive Officer
Bristol-Myers Company
345 Park Avenue
New York, New York 10022

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1634 N. Olsen Avenue
Tucson, Arizona 85719

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5050 Oakland Avenue
St. Louis, Missouri 63166

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1512 Glenwood Avenue
Oklahoma City, Okla. 73116

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President
Hilton Hotels Corporation
9990 Santa Monica Boulevard
Beverly Hills, Calif. 90212

Mr. Harold Horvitz
Attorney-at-Law
Guterman, Horvitz, Rubin,
Rudman and Katz
Three Center Plaza
Boston, Mass. 02108

Dr. David Jacobson
207 Beechwood Lane
San Antonio, Texas 78216

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Board of Prison Terms and
Paroles
805 Capitol Center Building
401 West Fifth Avenue
Olympia, Washington 98501

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30 Rockefeller Plaza
New York, New York 10020

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New York, New York 10022

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Superior Court – District of
Columbia
Washington, D.C. 20001

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9 Brighton Road
Clifton, New Jersey 07012

Dr. Lawrence C. Kolb
Psychiatric Institute
Department of Mental Hygiene
722 West 168th Street
New York, New York 10032

*Hon. Arthur S. Lane
General Counsel
Johnson & Johnson
501 George Street
New Brunswick, N.J. 08903

*Mr. Sigurd S. Larmon
Chrysler Building
405 Lexington Avenue
New York, New York 10017

*Mr. John W. Larsen
President
The Bowery Savings Bank
110 East 42nd Street
New York, New York 10017

Mr. Peter Levathes
150 East 69th Street
New York, New York 10021

Mr. Carl M. Loeb, Jr.
501 East 87th Street
New York, New York 10028

Mr. Manuel Lopez
Executive Director
Social Action Commission
Diocese of Brownsville
318 East Van Buren
Suite 218
Harlingen, Texas 78550

*Mr. Dan W. Lufkin
Poverty Hollow Road
Newtown, Conn. 06470

Mr. Milton Luger
Director
New York State Executive Department
Division for Youth
2 University Place
Albany, New York 12203

Ms. Marilyn Lutton
2571 Wendover
Bloomfield Hills, Mich. 48013

Mr. Pat Malloy
Attorney-at-Law
813 Thurston National Building
Tulsa, Oklahoma 74103

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New York, New York 10018

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American Can Corporation
American Lane
Greenwich, Conn. 06830

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Women's Crusade Against Crime
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St. Louis, Missouri 63103

Dean Robert McKay
New York University
School of Law
40 Washington Square South
New York, New York 10012

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The Menninger Foundation
1439 South Michigan Avenue
Chicago, Illinois 60605

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299 Park Avenue
New York, New York 10007

*Mr. William T. Moran
Marketing Research Director
Lever Brothers Company
390 Park Avenue
New York, New York 10022

Dr. Norval Morris
Director
Center for Studies in Criminal Justice
University of Chicago Law School
5807 South Ellis Avenue
Chicago, Illinois 60637

*Mr. Patrick V. Murphy
President
Police Foundation
1015 18th Street, N.W.
Suite 700
Washington, D.C. 20036

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Agridor Farm
Skillman, N. J. 08558

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Vice President
Eastin-Phelan Corporation
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Davenport, Iowa 52808

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440 Lincoln Street
Worcester, Mass. 01605

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235 East 42nd Street
New York, New York 10017

Mr. E. Barrett Prettyman, Jr.
Attorney-at-Law
Hogan & Hartson
815 Connecticut Avenue
Washington, D.C. 20006

Mr. Fred R. Raach
3-D Turtle Creek Drive
Tequesta, Florida 33458

Professor Fritz Redl
100 Porter Street
North Adams, Mass. 01247

Mr. Elmer W. Reeves
3415 Spruce Avenue
West Palm Beach, Fla. 33407

Ms. Janet Reno
Administrative Assistant
State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

*Hon. Elliot L. Richardson
Woodrow Wilson Int'l. Center for Scholars
The Smithsonian Institute
1000 Jefferson Drive, S.W.
Washington, D.C. 20560

Hon. Scovel Richardson
Presiding Judge
U.S. Customs Court
1 Federal Plaza
New York, New York 10007

Ms. Gladys E. Rivera
New York Telephone Company
Supervisor – Urban Affairs
215-48 93rd Avenue
Queens Village, New York 11428

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President
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3000 Westchester Avenue
Harrison, New York 10528

Mr. David Rothenberg
Executive Director
Fortune Society
29 East 22nd Street
New York, New York 10010

*Mrs. H. M. Rozendaal
2128 Rosendale Road
Schenectady, New York 12309

Mr. Henry T. Rutledge
Chairman
Northwest Bancorporation
7200 Northwestern Bank Bldg.
Minneapolis, Minnesota 55480

Mr. Robert D. Sack
Attorney-at-Law
Patterson, Belknap & Webb
30 Rockefeller Plaza
New York, New York 10020

Mr. Philip B. Schnering
Hillside Road
Stevenson, Maryland 21153

*Mr. William Schoen
Research and Planning Associate
Public Relations Department
Ford Motor Company
The American Road
Dearborn, Michigan 48121

Col. SaLees Seddon
Treasurer
Board of Police Commissioners
315 South 12th Street
St. Louis, Missouri 63103

*Mr. Russell Service
Deputy County Executive
Executive Building
1 West Street
Mineola, New York 11501

*Hon. Caroline K. Simon
Counsel to Surrey, Karasik, Greene and Seham
500 Fifth Avenue
New York, New York 10036

Mrs. William Y. Smith
3620 Ridgeway Terrace
Falls Church, Virginia 22044

Mrs. Hobart A. Spalding
1408 31st Street, N.W.
Washington, D.C. 20007

Mr. Arthur H. Spiegel
Spiegel and Stenson
P.O. Box 1042
Albuquerque, N. M. 87103

*Mrs. Potter Stewart
5136 Palisade Lane, N.W.
Washington, D.C. 20016

Mr. John L. Stickley
Chairman of the Board
John L. Stickley and Company
1615 East Boulevard
Charlotte, N. C. 28203

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Honorary Chairman
Combined Insurance Company of America
5050 Broadway
Chicago, Illinois 60640

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Chairman of the Board
National Can Corporation
5959 South Cicero Avenue
Chicago, Illinois 60638

Mr. Alfred K. Suga
Vice President for Operations
Pacific Concrete and Rock Co., Ltd.
2344 Pahounui Drive
Honolulu, Hawaii 96819

Thomas S. Szasz, M.D.
Professor of Psychiatry
Upstate Medical Center
State University Hospital
750 East Adams Street
Syracuse, New York 13210

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General American Transportation Corp.
120 South Riverside Plaza
Chicago, Illinois 60680

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Universal Oil Products Company
10 UOP Plaza
Des Plaines, Illinois 60016

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Chairman
Armco Steel Corporation
703 Curtis Street
Middletown, Ohio 45042

Mr. John M. Walker, Jr.
Assistant U. S. Attorney
U. S. Attorney's Office
Southern District of New York
New York, New York 10007

Mr. John A. Wallace
450 Forest Avenue
Apt. A 307
Norristown, Pa. 19401

Mr. Hunter P. Wharton
President
International Union of Operating Engineers
1125 17th Street, N.W.
Washington, D.C. 20036

Mrs. Christine T. Whitman
Coordinator for Public Relations
Association of Junior Leagues, Inc.
825 Third Avenue
New York, New York 10022

*Mrs. Arthur G. Whyte, Jr.
Hillside Road
Greenwich, Conn. 06830

*Mr. Charles B. Wilkinson
Bud Wilkinson Associates
National Foundation Center
3535 Northwest 58th
Suite 820
Oklahoma City, Okla. 73112

*Mr. J. Albert Woll
AFL-CIO General Counsel
736 Bowen Building
Washington, D.C. 20005